UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Isochem North America, LLC,	)	**Docket No. TSCA-02-2006-9143**
	)	
Respondent.	)	
	)	

ORDER ON COMPLAINANT'S MOTIONS TO COMPEL DISCOVERY

I. Background

The Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("Complainant") commenced this administrative proceeding by filing a Complaint on March 21, 2006 against Isochem North America, LLC ("Respondent" or "Isochem") for its alleged failure to file a "Form U" for 2002, as required by the Inventory Update Rule, 40 C.F.R. § 710.33(b), in regard to 19 chemical substances Respondent allegedly manufactured or imported in excess of 10,000 pounds during the relevant period (calendar year 2001) at its New Jersey and Texas facilities. The Inventory Update Rule was promulgated for the update of the chemical inventory established under Section 8(b) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2607(b). Complainant asserts that each of the alleged reporting failures constitutes a separate violation of 40 C.F.R. § 710.33(b) and Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), and proposes a penalty of $18,700 per violation, for a total proposed penalty of $355,300. In its Initial Answer and Amended Answer, dated November 13, 2006, Respondent admitted ownership of the New Jersey and Texas facilities, denied that its actions constituted violations of TSCA, and set forth "affirmative defenses." In its Amended Answer, Respondent added a claim that it does not have the ability to pay the proposed penalty. The parties filed their Initial Prehearing Exchanges in August 2006, and since then have filed several motions which have been ruled upon.

On December 27, 2007, an Order was issued granting Complainant's Motion for Accelerated Decision as to the 14 violations pertaining to Respondent's New Jersey Facility, denying Respondent's Cross-Motion to Dismiss the Complaint, granting Respondent's Cross-Motion to Amend Answer to withdraw its admission that it owned or controlled the Texas Facility, and denying Respondent's Cross-Motion to Amend Answer to add an affirmative defense. Accordingly, Respondent filed a Second Amended Answer, dated January 4, 2008, denying that it owned or controlled the Texas Facility, which pertains to five alleged violations. In response to the directive in the December 27 Order to file any supplemental prehearing exchanges, Respondent submitted a Supplemental Prehearing Exchange on January 25, 2008. In its Supplemental Prehearing Exchange, in addition to the exhibits that had been listed in its Initial Prehearing Exchange, Respondent listed one other exhibit, Exhibit R8, described as

"Audited Financial Statements for 2007 for ISOCHEM NA (currently not available, but expected to be available prior to hearing)." [1]

On February 4, 2008, Complainant submitted a "Motion to Compel Production, and Failing Respondent's Compliance, for an Order of Exclusion and the Drawing of an Adverse Inference" ("First Motion"). The First Motion requests an order compelling Respondent to produce and provide to Complainant, by February 15, 2008, the "Audited Financial Statements for 2007 of ISOCHEM NA" as referenced in Respondent's Supplemental Prehearing Exchange of January 25, 2008. This Motion further requests that if Respondent fails by said date to provide the statements sought, those statements be excluded from the record and an inference be drawn that the information contained in them would be adverse to Respondent.

On February 8, 2008, Complainant submitted a "Motion to Compel the Production of Documents, Propound Interrogatories, and to Take the Deposition of Daniel L. Slick" ("Second Motion"). Therein, Complainant requests issuance of an order compelling Respondent to answer interrogatories and to produce documents by April 1, 2008, as to the Texas Facility, and directing Respondent to make Isochem's president and chief executive officer (CEO), Daniel Slick, available for deposition during the week of April 7, 2008. Complainant further requested that the hearing be postponed until April 29, 2008. Given the short time frames for submitting and reviewing any documents in advance of the March 4 hearing date, that request was granted, resetting the hearing to the first mutually agreeable date of May 14, 2008, by order dated February 21, 2008.

To date, Respondent has not submitted any response to either motion.

On March 4, 2008, Complainant filed and served a letter asserting that during a settlement conference on February 11, 2008, Respondent provided Complainant's counsel with a two-page document entitled "ISOCHEM NORTH AMERICA LLC (A WHOLLY OWNED SUBSIDIARY OF SNPE, INC.) STATEMENT OF OPERATIONS AND MEMBER'S EQUITY for the Twelve Months Ending December 31, 2007." Complainant asserts that the two pages list dollar figures under various headings, but there is no indication that the information has been audited nor is there any certification as to accuracy or reliability of the figures. Therefore, Complainant asserts that it has no verifiable basis to conclude that the document constitutes the "Audited Financial Statements for 2007 of ISOCHEM NA" referenced in its Supplemental Prehearing Exchange. Accordingly, Complainant requests that its First Motion be granted, setting a due date for submission of the Audited Financial Statements, and, if not met, drawing an adverse inference and precluding admission of such document. Complainant also reiterates its request for relief on the Second Motion, noting the failure of Respondent to timely respond.

[1] Neither Exhibit R8, nor any other financial document, was listed in Respondent's 2006 Initial Prehearing Exchange.

II. Arguments on the First Motion

In its First Motion, Complainant asserts that it has not received the 2007 Audited Financial Statements from Respondent, and that the Motion meets the criteria for "other discovery" after the prehearing exchange, set out in 40 C.F.R. §22.19(e). Complainant argues that granting the Motion will not unreasonably delay the proceeding, should not unreasonably burden Respondent and the documents sought are most reasonably obtained from Respondent because they are in its possession, pertain to its financial condition, and are not available through public sources. Complainant asserts that Respondent "has never offered voluntarily to turn over these audited financial statements" and its assertion that they "are expected to be available prior to the hearing" is not a definite commitment to produce them and does not state a date of availability. First Motion at 8, 9. The documents contain information that has significant probative value on a disputed issue of fact relevant to the relief Complainant seeks, and, Complainant notes, ability to pay is a factor listed in Section 16(a)(2) of TSCA that EPA must consider in assessing a penalty.

Complainant asserts that compelling production is needed in order for EPA to have a reasonable opportunity to review, evaluate and rebut the financial statements, which must be reviewed by Complainant's financial expert and which are the only evidence Respondent has indicated it will introduce on the inability to pay defense. First Motion at 9, 10. Complainant suggests that it would be prejudiced at the hearing if it does not have adequate time for such review and preparation for the hearing. *Id.* at 11. Given the uncertainty of the contents of the documents, Complainant speculates that they may contain complex financial information. Further, Complainant points out that Respondent failed to comply with the requirement of 40 C.F.R. §22.19(f) to "promptly supplement . . .the [prehearing] exchange when the party learns that the information exchanged is incomplete" when it failed to supplement its prehearing exchange with information as to inability to pay after asserting the inability to pay defense in its Amended Answer in November 2006. *Id.* at 10.

Additionally, Complainant cites to the Environmental Appeals Board (EAB) decision *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994), which states that "in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of [the] hearing. Complainant argues that to be effective, an order compelling production of documents must provide for sanctions for failure to comply. Complainant therefore requests, pursuant to 40 C.F.R. § 22.19(g)(1) and (2), an order providing that if Respondent fails to produce the Audited Financial Statements by the due date, Respondent be precluded from introducing them into the record and that an appropriate inference be drawn adverse to Respondent on the issue of ability to pay. Complainant cites to orders issued by ALJs in which the inability to pay defense was stricken and adverse inference was drawn, or respondents were precluded from presenting evidence or testimony thereon where they failed to timely comply with an order compelling discovery of documents pertaining thereto. Complainant also cites to the EAB decision *William E. Comely, Inc. and Bleach Tek, Inc.*, 11 E.A.D. 247 (EAB 2004)(upholding ALJ's exercise of discretion in drawing an adverse inference against the respondents for failure to comply with a discovery order).

III. Arguments on the Second Motion

Complainant acknowledges that it has the burden to establish Respondent's ownership and/or control of the Texas Facility for the five alleged violations for which liability remains in dispute. Complainant points out that the only information in the record in support of Respondent's position that Isochem did not own or control the Texas Facility are two Declarations from Mr. Slick. The information therein is incomplete, Complainant asserts, as there are ambiguities, contradictions and gaps in the information. They do not eliminate the possibility that Isochem or its predecessor, SNPE North America LLC ("SNPE NA"), owned or to some extent controlled the Texas Facility in 2001. In order to ensure that the facts are fully elicited in this proceeding, Complainant seeks this to obtain the details behind the facts asserted in Mr. Slick's Declarations. Complainant asserts that the definition of "control" in 40 C.F.R. §704.3 can be broadly and flexibly interpreted such that various activities or operational responsibilities would be included. Complainant describes several possibilities in which Isochem's predecessor may have had some control over the Texas Facility. Complainant points out that the Declarations of Mr. Slick do not indicate who assumed responsibility for legal obligations and liabilities of SNPE Chemicals, Inc., which went out of business in 2002 and controlled the Texas Facility according to Respondent. Attached to the Second Motion is an Affidavit of Michael Bious, dated February 7, 2008, describing certain information he received from Dow Chemical Company regarding a facility in LaPorte, Texas and Mr. Slick.

Complainant presents as Exhibit B to the Second Motion a letter dated January 9, 2008, from EPA counsel to Isochem's counsel requesting documents pertaining to the Texas Facility and the various corporations referenced by Respondent. Complainant asserts that Isochem has not provided anything in response to the letter, and has not otherwise provided any information concerning ownership and control of the Texas Facility. Second Motion at 21. Thus, it argues that one of the factors of "other discovery" set out in 40 C.F.R. §22.19(e) is met. Complainant also argues that any delay would not be unreasonable given that the issue of ownership and operation of the Texas Facility was not in contention until Respondent was granted leave on December 27, 2007 to amend its Answer, considering any prejudice to the parties, and considering that the parties were ordered to file any supplemental prehearing exchanges by January 25, which would make a motion for "other discovery" premature until after that date. Complainant claims that the discovery will not unreasonably burden Respondent and is most reasonably obtained from Respondent because the information requested is within its possession and knowledge and was a subject of its Cross-Motion to Amend the Answer. Complainant suggests that the information it seeks has significant probative value on a disputed issue of material fact relevant to liability and penalty, as the requirement to file the Form U for the five chemicals turns on the ownership and control of the Texas Facility.

Furthermore, Complainant requests permission to depose Mr. Slick on the basis that such request also meets those criteria plus the additional criterion for depositions set forth in 40 C.F.R. §22.19(e)(3)(1), that the information sought "cannot reasonably be obtained by

alternative methods of discovery." Complainant argues that "the spontaneity that is the hallmark of a deposition – the opportunity and ability to pursue responses (especially unexpected ones or ones pointing in new directions) and follow them to wherever they might lead – is only available through depositions" and the "opportunity to slowly elicit the facts in a deliberate and methodical fashion optimally occurs through depositions," as "one cannot realistically expect a party to be possessed of such foresight as to foretell all unanticipated twists and turns in the unfolding of a narrative . . . especially when . . . so many gaps existed in the inchoate evidentiary record" and "no party can be expected to envision a party's responses so that all necessary follow-up questions can be prepared beforehand." Second Motion at 23-24. Complainant urges that the deposition is the most realistically effective means to obtain substantive evidence critical to its understanding of the incomplete picture regarding control over the Texas Facility in 2001. Complainant points out that Mr. Slick is the only witness Isochem listed, and asserts that cross examination at the hearing would not suffice, given the remaining questions as to the Texas Facility. Complainant alleges that it would be prejudiced without the discovery requested, as its ability to prepare for trial will be compromised without it, particularly where EPA relied on Respondent's admissions in its Answer as to the Texas Facility until the December 27 Order.

Consequently, Complainant seeks an order compelling Respondent by April 1, 2008 to respond to the Interrogatories set forth in Attachment A to its Second Motion and to provide to Complainant the documents requested in its letter dated January 9, 2008 (Attachment B), and directing Respondent to make Mr. Slick available for deposition during the week of April 7, 2008.

IV. Discussion

The Rules of Practice provide at 40 C.F.R. § 22.16(b) that a response to a motion "must be filed within 15 days after service of such motion," and that "Any party who fails to respond within the designated period waives any objection to the granting of the motion." Respondent's response to the First Motion was due on February 19, 2008 and the response to the Second Motion was due February 25, 2008, which is the next business day after the 15-day period, which expired on a Saturday. By its failure to file any response to the motions on or before those due dates, Respondent is deemed to have waived any objection to the granting of the motions. Such a waiver is supported by the failure of Respondent to file within a reasonable period after the due dates expired a motion for leave to file a response out of time. Such a waiver is further supported by the history of this case, including the fact that Respondent was subject to two motions for default in this proceeding for failure to respond, and thereby has been explicitly warned of the consequences of failing to file timely responses.

In addition to waiver as a basis for granting Complainant's motions, they also are granted on their merits. Discovery other than that in the prehearing exchange may be ordered only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the

non-moving party;
(ii) Seeks information that is most reasonably obtained from the non-moving party and which the non-moving party has refused to provide voluntarily; and
(iii) Seeks information that has a significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

The Environmental Appeals Board ("EAB") has stated that "in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of [the] hearing." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). While the EAB did not specify how far in advance of the hearing such documents should be provided, the timing of production of documents must ensure that the opposing party has sufficient time to review them and prepare for the hearing. Complainant's pleadings suggest that if Respondent supplies the documents requested in the motions by April 1, Complainant will have sufficient time to prepare its analysis and rebuttal arguments. Thus, the discovery requests in the motions will not unreasonably delay the proceeding.

Providing to Complainant the one document requested in the First Motion, which Respondent offered to produce in its Supplemental Prehearing Exchange, certainly would not unreasonably burden Respondent. As to the Second Motion, while Complainant proposes a large number of interrogatories and several requests for production as well as a deposition of Mr. Slick, they are intended to elicit information on only one subject, control of the Texas Facility, details of which Respondent to date has not been forthcoming on. The information in the Declarations of Mr. Slick were concise but did not include supporting details or documents. Given his position, such details should be known to Mr. Slick and such documents should be in his possession or readily available to him. The interrogatories, document production requests and request for deposition in the Second Motion thus would not unreasonably burden Respondent and are most reasonably obtained from Respondent. Respondent's failure to produce Isochem's Audited Financial Statements for 2007, documents requested in Complainant's letter dated January 9, 2008, and responses to the interrogatories submitted with the Second Motion, establish that Respondent has refused to provide voluntarily the information sought.

As to the third criterion, 40 C.F.R. § 22.19(e)(1)(iii), liability as to the five counts pertaining to the Texas Facility turns on whether Respondent owned or controlled that facility, and the parties dispute this issue. The document requests and proposed interrogatories seek information on that issue and thus it would have significant probative value on the issue. Applying the third criterion to the First Motion, the only documents listed in Respondent's Prehearing Exchange which could be relevant to its claim of inability to pay the proposed penalty are the Audited Financial Statements for 2007. As pointed out by Complainant, inability to pay is a penalty determination factor under Section 16(a)(2) of TSCA that EPA must consider in assessing a penalty and which the parties apparently dispute. Thus, the Audited Financial Statements are the only documents that Respondent has referenced which could have significant

probative value on a disputed issue of fact material to the relief sought.

As to the request to take a deposition of Mr. Slick, Complainant must meet either of two criteria: (1) the information sought cannot reasonably be obtained by alternative methods of discovery, or (2) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3). Complainant asserts that it has met the first criterion, and the second criterion does not seem applicable where Mr. Slick is listed as a witness to appear at the hearing. The fact that Complainant has submitted a number of interrogatories may suggest that the information sought can be obtained by Respondent's answers thereto. However, Complainant's arguments in favor of taking the deposition are persuasive particularly in the circumstances of this case. Respondent in this proceeding has shown a tendency to be non-responsive (see, Complainant's Motions for Default, Complainant's letter dated March 4, 2008, and Respondent's failure to respond to January 9, 2008 letter), delayed in responding (see, Respondent's Motions for Extension of Time), neglectful in responding (see, Cross-Motion to Amend Answer), and/or minimal in providing information (see, Declarations of Daniel Slick, Respondent's Prehearing Exchange and Supplement thereto, Complainant's letter dated March 4, 2008). To ensure that sufficient information as to the remaining issue of liability is elicited for Complainant's review and preparation for the hearing, the request to direct Respondent to make Mr. Slick available the week of April 7, 2008 for deposition is granted.

Accordingly, Complainant's requests in its First Motion and Second Motion for orders to compel discovery and deposition are granted.

Complainant requests in its First Motion that in the event Respondent fails to produce the requested documentation, Respondent be precluded from later introducing it into the record. Either party may amend its prehearing exchange upon the granting of a motion for leave to do so. The Rules of Practice do not provide a standard for granting such motions, so such motions will be ruled upon based on the grounds stated in the motion and the circumstances of the case, including timeliness of the motion and any prejudice to the opposing party. Without knowing the basis for any delay in Respondent obtaining the Audited Financial Statements or any other documents relevant to ability to pay, it is not prudent to rule in advance of any such motion that it will be denied or to find that Respondent has failed to promptly supplement the prehearing exchange under 40 C.F.R. § 22.19(f).

The Rules of Practice at 40 C.F.R. § 22.19(g) provide that "Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion . . . [i]nfer that the information would be adverse to the party failing to provide it [or] . . .[e]xclude the information from evidence." 40 C.F.R. § 22.19(g)(1) and (2). This provision contemplates that the failure to provide the information occur prior to excluding it from evidence or drawing an adverse inference. Respondent has not yet been found to have failed to provide information within its control as required under Section 22.19. Respondent is sufficiently warned herein that it may be precluded from presenting information under Section 22.19(g)(2), or that an adverse inference may be drawn under Section 22.19(g)(1), if Respondent

fails to submit the Audited Financial Statements by April 1. Thus, Complainant's request for an order precluding Respondent from introducing the financial documents into the record, and for an adverse inference to be drawn, is denied. Complainant may renew its request as necessary.

ORDER

1. Complainant's Motion to Compel Production dated February 4, 2008 is **GRANTED** with respect to the request to compel production of documents. On or before **April 1, 2008**, Respondent shall submit to Complainant the documents requested in Complainant's Motion to Compel Production.

2. Complainant's Motion to Compel Production, dated February 4, 2008 is **DENIED** as to the request for an order providing that in the event Respondent fails to submit Isochem's Audited Financial Statements for 2007, an adverse inference be drawn and that Respondent be precluded from introducing such documents into the record.

3. Complainant's request to compel production of documents in its Motion dated February 8, 2008 is **GRANTED**. On or before **April 1, 2008**, Respondent shall submit to Complainant the documents requested in the February 8, 2008 Motion, Attachment B.

4. Complainant's request to propound interrogatories in its Motion dated February 8, 2008 is **GRANTED**. On or before **April 1, 2008**, Respondent shall submit to Complainant sworn answers to the Interrogatories set forth in Attachment A to Complainant's Motion to Compel Production of Documents, Propound Interrogatories and to Take the Deposition of Daniel L. Slick, dated February 8, 2008.

5. Complainant's request to take the deposition of Daniel L. Slick in the Motion dated February 8, 2008 is **GRANTED**. Respondent shall make Isochem's president and chief executive officer (CEO), Daniel Slick, available for deposition during the week of April 7, 2008.

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Susan L. Biro
Chief Administrative Law Judge

Dated: March 6, 2008
Washington, D.C.